

¹ All ratings referenced in this Order are to the whole body and based upon the 4th edition of the *Guides*. American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

by Drs. Ciccarelli and Koprivica. The claimant requests review of this decision alleging the Award should be modified to reflect the entire additional 10 percent of additional impairment as assigned by Dr. Koprivica. Alternatively, claimant suggests that the ALJ erred in his computation and when appropriately averaged, the two physicians' ratings *attributable to this injury* yield a 6 percent permanent impairment. Respondent argues that the ALJ should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The underlying facts surrounding this claim are not in dispute. Claimant sustained an earlier work-related injury in November 2007. That injury, to his low back at the L5-S1 level, led to surgery and ultimately, the claim was settled based upon an ultimate impairment rating of 15 percent.² According to claimant, the surgery relieved the majority of the pain in his back and left leg and he had only minimal symptoms.

Thereafter, in April of 2008, claimant returned to his normal work duties and on September 3, 2008, he again injured his back at the same level as he previously injured. Claimant was treated conservatively and while he missed some work, he eventually returned to his previous position working all his normal assignments in October, 2008.

Claimant testified that he now experiences numbness in his left foot, a symptom that did not exist until his most recent accident. And he still has pain and stiffness in his back which is worse in the morning but subsides as the day goes on and claimant is active and moving around. He performs his regular job duties without medication and complaint.

Two physicians testified and offered opinions as to claimant's impairment both as to the September 2008 accident at issue herein as well as claimant's earlier injury. Dr. Ciccarelli, an orthopaedic surgeon who was retained to treat claimant's injuries both in this claim and in the earlier one, testified that claimant's first accident left him with a 10 percent impairment due to the radicular complaints which were owing to a free fragment that was pressing on claimant's S1 nerve root. The surgery addressed this issue as well as the herniated disc and relieved claimant's symptoms.

He went on to testify that the September 2008 accident caused a recurrent herniation at the same level, something that is not altogether unexpected as the disc wall was weakened by the earlier herniation. Following an examination on October 7, 2008, Dr.

² This 15 percent is an average of the two impairment ratings offered by Dr. Koprivica (20 percent) and Dr. Ciccarelli (10 percent) as a result of claimant's earlier accident.

Ciccarelli prescribed conservative treatment and by November 18, 2008, released claimant to full duties. Claimant was still having intermittent radicular complaints following this second accident but overall, he had minimal complaints.

Dr. Ciccarelli testified that in addition to the previous 10 percent impairment he assigned for the earlier injury, that he believed claimant had sustained a 2 percent impairment.³ He explained that claimant had most certainly sustained injury as a result of his subsequent work-related accident as evidenced by the repeat MRI which revealed the recurrent herniation. And, he added, that while that injury did not, under the *Guides*, qualify for a 5 percent impairment, he felt that some impairment was warranted. Thus, based upon his examination, he assigned a 2 percent based upon Table 72 on page 110 of the *Guides*.

Dr. P. Brent Koprivica, a physician who is board certified in both emergency care and occupational medicine, also testified in this matter and evaluated claimant for purposes of both this claim and the earlier one. Dr. Koprivica initially evaluated claimant on April 23, 2008 and assigned a 20 percent impairment as a result of claimant's earlier accident. He again examined claimant on April 1, 2009 for purposes of this claim and during this visit, he noted claimant's complaints of numbness and pain radiating down claimant's left leg and into his foot along with soreness in the lower back. He also noted some limitation of motion since the first accident and more atrophy in the left calf.

Dr. Koprivica rated claimant at an additional 10 percent, above and beyond the earlier rating he assigned. And when combined with the earlier 15 percent assigned as a result of the settlement hearing, he explained that claimant bore a total of 24 percent impairment. When asked how claimant's condition had changed as a result of this second accident Dr. Koprivica explained that claimant has more limitations on his range of motion, greater atrophy in the leg and bears a new disc herniation.⁴ On cross examination, Dr. Koprivica conceded that many of the measurements he took in his second evaluation were not drastically different from the earlier exam and in some instances, were the same, due in part to normal variances that occur from exam to exam. More importantly, he was questioned about his earlier rating of 20 percent when, in fact, the MRI results did not reveal any loss of segment integrity, a finding that is warranted in order to assign a 20 percent rating under the *Guides*. Dr. Koprivica testified that following claimant's first accident his "appearance" was similar to an individual who has suffered a loss of segment integrity, thus he felt the original assignment of 20 percent impairment was fair.⁵

³ Ciccarelli Depo. at 11; Resp. Ex. C at 1 (Sept. 15, 2009 letter).

⁴ Koprivica Depo. at 16.

⁵ *Id.* at 26-27.

The ALJ considered this evidence and concluded the following:

Both physicians utilized the *Guides* in a somewhat loose fashion, but for that reason both rating options were considered equally credible. It is held the claimant's permanent functional impairment following the September 3, 2008 injury is a split of Dr. Ciccarelli's 12% and Dr. Koprivica's 24%, or 18% to the whole person. After applying the K.S.A. 44-501© [sic] credit for preexisting impairment of 15%, the present injury resulted in 3% impairment of the whole person.⁶

Claimant appeals and contends the ALJ erred in his method of calculating the impairment. Claimant argues that if the ALJ was going to simply average the two ratings applicable to the accident at issue, the result should have been 6 percent (Dr. Koprivica's 10 percent averaged with Dr. Ciccarelli's 2 percent). Alternatively, claimant suggests Dr. Koprivica's opinions as to impairment are more persuasive and his 10 percent impairment should have been adopted.

Respondent maintains the ALJ appropriately assigned impairment and that the Award should be affirmed in every respect.

The Board has considered this issue and concludes the ALJ's resulting impairment of 3 percent is reasonable under these facts and circumstances. Each physician saw claimant for both of his injuries, evaluated his complaints and assigned impairment. It is clear that although claimant most certainly sustained an injury following the April 2008 accident, he was treated conservatively and has returned to work with minimal symptoms. Given his recovery and the physicians' testimony, the Board finds the ALJ's ultimate finding of 3 percent impairment should not be disturbed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated May 5, 2010, is affirmed in every respect.

⁶ ALJ Award (May 5, 2010) at 4.

IT IS SO ORDERED.

Dated this _____ day of August 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge